



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Gary Bardsley
269 Eastman Hill Road
Sanbornton, NH 03269

Peter + Gary, LLC
6 Checkerberry Lane
Concord, NH 03301

Re: Holderness Road, Sandwich Tax Map 22
Lot 13, Program File #2005-0101

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING**

No. AF 05-093

November 7, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division to Gary Bardsley and Peter + Gary, LLC, pursuant to RSA 482-A and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling \$8,500 be imposed against Gary Bardsley and Peter + Gary, LLC, jointly and severally, for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Gary Bardsley is an individual with a mailing address of 269 Eastman Hill Road, Sanbornton, NH 03269.
3. Peter + Gary, LLC ("P+G") is a New Hampshire limited liability company with a principal office and mailing address of 6 Checkerberry Lane, Concord, NH 03301.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095

Telephone: (603) 271-3503 • Fax: (603) 271-2867 • TDD Access: Relay NH 1-800-735-2964

DES Web site: www.des.nh.gov

3. P+G is the owner of property located on Holderness Road in Sandwich, NH, more particularly described as Lot 13 on Sandwich Tax Map 22 ("Property"). Peter McGrath is the registered agent and manager of P+G, according to records maintained by the New Hampshire Office of the Secretary of State.
4. On December 12, 2004, P+G filed a *Notice of Intent to Cut Wood or Timber* on the Property with the Town of Sandwich. The Notice lists P+G as the Property owner and Gary Bardsley as the logger responsible for logging. Gary Bardsley signed the Notice as the logger for P+G. Peter McGrath signed the Notice as the Property owner and Manager of P+G.
5. On January 10, 2005, the Division received a *Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact* ("Forestry Notification") regarding the Property dated January 4, 2005. The Notification lists P+G as the Property owner and Gary Bardsley as the logger responsible for logging. Apparently, Gary Bardsley signed the Notification as the Property owner.
6. As required by the Forestry Notification, a US Geological Survey map and a photocopy of a poled ford was submitted with the location of two wetland crossings to be placed on the Property for the purpose of conducting logging activities.
7. The Forestry Notification states that the Property owner's signature certifies that "... all logging contractors have been directed to conform to the Best Management Practices for *Erosion Control on Timber Harvesting Operations in New Hampshire* ("Forestry BMPs") and have been instructed to install crossings only as indicated on the attached map and sketches."
8. On January 24, 2005, the Division issued a "Complete Forestry Notification" letter to P+G for the Property, acknowledging receipt of the Forestry Notification and stating that the Forestry Notification is sufficient to start work provided that they follow Forestry BMPs and avoid wetland and stream crossings where possible.
9. On January 24, 2005, Forest Ranger Robert Boyd issued an Official Notice to Mr. Bardsley for a violation of RSA 227-J:10, slash left in a stream. The Official Notice directed Mr. Bardsley to remove the slash prior to June 15, 2005. The Official Notice stated that time was extended "due to frozen conditions."
10. On April 11, 2005, the Division received a complaint alleging that a perennial stream had been re-routed as a result of logging operations performed on the Property.
11. On April 13, 2005, Division personnel conducted an inspection of the Property and observed the following:
 - a. A crossing device had been installed perpendicular to the flow of water. The crossing device had caused the stream to be re-routed from the channel and flow down an adjacent skid trail for approximately 300 linear feet;

b. A second crossing device had been installed in Eastman Brook. This crossing was not shown on the Forestry Notification. This crossing device had been installed over the brook. Water was flowing under this crossing;

c. A ditch approximately 200 feet long by 3 feet wide had been dug on a sloping hillside. The ditch originated at a natural spring. The exposed ditch carried water and sediment down slope, and into a forested wetland. The sediment trail in the wetland measured approximately 50' by 50'; and

d. No erosion controls were observed on the Property.

12. By letter dated April 14, 2005, the Division issued a letter to P+G and Mr. Bardsley requesting a temporary corrective action plan to restore the stream channel to Eastman Brook.

13. By FAX dated April 18, 2005, Attorney McGrath stated that a temporary corrective action plan would be submitted to the Division on April 19, 2005. The FAX also stated that Gove Environmental Services, Inc. would be retained to review and follow-up on the site and make necessary recommendations.

14. On April 19, 2005, the Division received a FAX from Attorney McGrath proposing measures to remove the crossing device blocking the perennial stream.

15. On April 25, 2005, the Division issued a Temporary Restoration Plan Approval to P+G and Mr. Bardsley.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINE

1. Gary Bardsley and P+G have violated RSA 482-A:3, I, by diverting more than 300 linear feet of stream channel without a permit from DES. For this violation, Env-C 614.05(c) specifies a fine of \$2,000.

2. Gary Bardsley and P+G have violated NH Admin. Rule Wt 304.05(c) by failing to comply with timber harvesting best management practices, specifically by:

(a) Failing to use erosion controls on the Property;

(b) Failing to remove poled fords immediately after use;

(c) Failing to correctly install a poled ford by placing the crossing perpendicular, rather than parallel, to the stream;

For these three violations, Env-C 614.06(f) specifies a fine of \$2,000 per violation, a fine of \$6,000 for this Property.

3. Gary Bardsley and P+G have violated RSA 482-A:3, I by filling approximately 250 square feet of wetland without a permit from DES. For this violation, Env-C614.02(a) specifies a fine of \$500.

The total fine being sought is \$8,500.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Gary Bardsley and Peter + Gary, LLC have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, January 23, 2006 at 2:30 pm in Room 110** of the DES offices at **29 Hazen Drive** in Concord, New Hampshire. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than December 12, 2005**, using the enclosed colored form as follows:

1. If you plan to attend the hearing, please sign the appearance section of the colored form (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If you choose to waive the hearing, the hearing will be conducted in your absence in accordance with Env C 204.09.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

If you are unable to attend the hearing as scheduled, you must notify the DES Legal Unit as soon as possible but not later than one week in advance of the hearing and request that the hearing be rescheduled for good cause. If you do not notify the DES Legal Unit in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:


1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.

2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Gary Bardsley and Peter + Gary, LLC committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-7509.


COPY

Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Linda Magoon, DES Wetlands Bureau
cc: Marjorie Swope, NHACC
Town of Sandwich Board of Selectmen and Conservation Commission

***** RETURN THIS PAGE ONLY *****

**PETER + GARY, LLC IS REQUIRED BY LAW TO
RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN December 12, 2005

APPEARANCE On behalf of Peter + Gary, LLC:

_____ I will attend the hearing scheduled for **Monday, January 23, 2006 at 2:30 pm.** in Room 110 of the DES offices at 29 Hazen Drive in Concord, New Hampshire.

Signature

Date

Name (please print or type): _____

Title: _____

Phone Number: _____

WAIVER OF HEARING On behalf of Peter + Gary, LLC:

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. I understand that the hearing will be conducted in my absence in accordance with Env-C 204.09.

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone Number: _____

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

DES Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95

Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.